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No. 09-379

In the Supreme Court of the United States

WILBUR ALLMOND, PETITIONER

v.

AKAL SECURITY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner was medically disqualified from serving as a Court Security Officer because he failed to meet the hearing requirements of the United States Marshals Service, which mandate that officers possess a particular degree of unaided hearing. Petitioner brought suit claiming, *inter alia*, that the Marshals Service had violated the Rehabilitation Act, 29 U.S.C. 701 *et seq.*, by regarding him as disabled and adopting a hearing standard that tended to screen out individuals that were so regarded.

The question presented is whether the court of appeals properly held that petitioner had failed to rebut the Marshals Service's showing of business necessity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 558 F.3d 1312. The order of the district court (Pet. App. 11a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2009. A petition for rehearing was denied on May 28, 2009 (Pet. App. 47a-48a). On August 13, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 25, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, prohibits discrimination by federal agencies and federally funded programs against qualified individuals with disabilities. The scope of the Rehabilitation Act is defined in part through standards of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* 29 U.S.C. 791(g), 794(d); see 29 C.F.R. 1614.203(b).

The ADA defines the term "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual," "a record of such an impairment," or "being regarded as having such an impairment," 42 U.S.C. 12102(2), and prohibits employers from using a qualification standard that screens out or tends to screen out individuals with disabilities unless the qualification standard is job-related and consistent with business necessity. 42 U.S.C. 12112(b)(6). "It may be a defense to a charge of discrimination * * * that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter." 42 U.S.C. 12113(a); see 42 U.S.C. 12112(b)(6).

2. Federal law assigns the United States Marshals Service the responsibility "to provide for the security * * * of the United States District Courts, the United States Courts of Appeals and the Court of International Trade." 28 U.S.C. 566(a). To fulfill that statutory mission, the Marshals Service contracts with private companies to supply security personnel, including Court

Security Officers (CSOs), at federal courthouses. Pet. App. 2a. Court Security Officers "perform a variety of protective services, such as guarding courthouse entrances, maintaining a security presence in courtrooms, and responding to emergency situations." *Ibid.*

In the wake of the bombing of a federal building in Oklahoma City, "and in response to judicial concern with the physical capability of security officers to respond to security threats and other emergency situations," the Judicial Conference of the United States asked the United States Public Health Service's Office of Federal Occupational Health to conduct a job task analysis of the CSO position. Pet. App. 2a-3a; Govt. C.A. Br. 4. Dr. Richard Miller, then the Director of Law Enforcement Medical Programs for the Office of Federal Occupational Health, conducted "a detailed analysis of the security officer position to identify the essential functions of the job and the medical qualifications necessary to perform it." Pet. App. 8a. The study included observation of CSOs on the job, convening of focus group discussions with CSOs, and individual interviews with judges and Marshals Service personnel regarding the demands of the CSO position. *Id.* at 3a.

The study identified six hearing-related tasks essential to the CSO position: "comprehending speech during face-to-face conversations, over the telephone, over the radio, and outside the range of sight; hearing sounds that require investigation"; and determining the location of sound. Pet. App. 3a. In particular, Dr. Miller concluded that CSOs must "be able to clearly understand directions in times of crisis [and] must be able to hear communication at a level of sound that does not inform persons causing an incident of the [officers'] response plans," and that these and similar hearing abilities are

integral to "[t]he safety of the federal judiciary, court personnel, and the public." *Ibid.* (internal quotation marks omitted; second and third brackets in original).

To ensure that all CSOs would be able to fulfill their essential job functions, Dr. Miller recommended specific changes to the CSO medical requirements, including new audiological standards. Pet. App. 3a-4a. Based on consultations with a specialist in law enforcement occupational audiology, as well as other experts in the field, Dr. Miller concluded that CSOs should be required to pass their hearing tests without the assistance of a hearing aid. *Ibid.*; Govt. C.A. Br. 5 & 29 n.5. Dr. Miller's consultations with these specialists revealed that hearing aids, as mechanical devices, exhibit risks of battery failure, device failure, intermittent electronic interference or incompatibility with sound equipment, and failure caused by physical activity. *Id.* at 29-30. Intermittent conditions such as debris in the ear canal and improper seating or placement can also decrease or eliminate the effectiveness of the instrument. *Id.* at 30. The resulting standard required testing for unaided hearing because, in the event of any of these contingencies, CSOs must rely on their residual hearing to accomplish the immediate tasks before them. *Ibid.*

The new hearing standards accordingly permit some hearing loss, but require that candidates be able to meet the standards without the use of a hearing aid. Pet. App. 3a-4a, 12a-14a. CSOs who pass the hearing requirements without a hearing aid may wear hearing aids on the job, *id.* at 3a, 12a, but the requirements were designed to "ensure that all officers can perform effectively in the event their hearing aids experience interference, become dislodged, or otherwise fail on the job," *id.* at 4a.

3. Petitioner was employed by Akal Security, Inc., as a CSO in the United States District Court for the Middle District of Georgia. Pet. App. 11a-12a. Following a physical examination in February 2003, petitioner was informed that he had not satisfied the CSO hearing standards. *Id.* at 4a, 14a-15a. Petitioner was advised to see a specialist for additional tests; when the results confirmed that he was unable to meet the hearing standards, the government physician reviewing his file proposed further testing to ensure that the results accurately reflected petitioner's hearing ability. *Id.* at 4a, 15a-16a. Petitioner's third set of test results continued to evidence a "decreased ability to distinguish speech in the absence of background noise (speech discrimination in quiet of 84% right and 68% left)" that fell below the Marshals Service standards. *Id.* at 16a. The Marshals Service notified Akal of petitioner's CSO disqualification in February 2004, and Akal terminated petitioner's employment. *Id.* at 4a-5a.

4. Petitioner brought suit against Akal and the Attorney General, contending that the requirement that a CSO meet the Marshals Service hearing standards based on his natural hearing violated the ADA and the Rehabilitation Act. Pet. App. 5a. The district court granted summary judgment to respondents, holding that, although there was a genuine dispute whether petitioner had been regarded as disabled, *id.* at 25a-36a, the record unequivocally established that the hearing requirements are job-related and consistent with business necessity, *id.* at 39a-45a.

The Eleventh Circuit affirmed. Pet. App. 1a-10a. The court "express[ed] no view on whether Allmond [was] disabled under federal law," *id.* at 6a, but held that he had failed to raise a genuine issue of fact regarding

the defense of business necessity. The court explained that a defendant's burden of establishing such a defense is "generally quite high," but "is significantly lowered when, like here, the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great." *Id.* at 7a (quotation marks omitted).

The court held that the hearing standards are job related because they were derived from a "detailed analysis of the security officer position to identify the essential functions of the job and the medical qualifications necessary to perform it." Pet. App. 8a. The court observed that "hearing aids may malfunction, break, or become dislodged," and that this contingency "would present an unacceptable risk to the safety of others" if it occurred at a critical moment. *Id.* at 9a & n.8. Indeed, petitioner's experts had not disputed either point. See Govt. C.A. Br. 30-31. The court rejected petitioner's argument that the Marshals Service could not establish a business necessity defense for the hearing standards unless it could show examples of CSOs' hearing aids failing at times of crises, explaining that "neither the ADA nor the Rehabilitation Act requires employers to forgo a qualification standard 'until a perceived threat becomes real or questionable behavior results in injuries.'" Pet. App. 9a n.7 (quoting *Watson* v. *City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999)). In light of the uncontested risks acknowledged by both sides' experts, and "considered in the light of the tremendous harm that could result if a security officer could not perform the essential hearing functions of his job at a given moment," the court held the Marshals Service standards to be "legitimate and wholly consistent with business necessity." *Id.* at 9a.

ARGUMENT

Petitioner urges (Pet. 30) this Court to grant review of the court of appeals' holding that a business necessity defense "can be established merely by suggesting that there is a possibility, no matter how slight, that a situation 'may' arise in which the employment of a disabled worker could lead to injury." The court of appeals did not adopt the rule ascribed to it by petitioner, and thus there is no warrant for this Court to review such a rule in this case. It merely held that, on the record in this case, there was no genuine issue of material fact—a factbound issue unsuited for this Corut's review. Petitioner contends (Pet. 31) that this case presents an issue of substantial importance whether a safety-related business necessity defense must satisfy the "direct threat" standard of 42 U.S.C. 12113(b), which requires "a significant risk to the health or safety of others," 42 U.S.C. 12111(3). But petitioner did not make that argument before the court of appeals and this Court should not consider the issue in the first instance. Moreover, review by this Court is unwarranted because even if the question presented were resolved favorably to petitioner, it would not alter the outcome—his claim would still fail for the independent reason that he is not "disabled" within the meaning of the Rehabilitation Act. The petition should therefore be denied.

1. Petitioner seeks review by this Court of the question whether "it is lawful for an employer to dismiss a worker with a disability merely because a conceivable situation 'may' occur in which that employee would pose a risk to safety, without regard to how unlikely that occurrence might be." Pet. i. That question is not implicated by the decision below.

Petitioner faults the court of appeals for stating that hearing aids "may malfunction, break, or become dislodged," Pet. App. 9a, without assigning any particular quantum of likelihood to such occurrences. This statement, in petitioner's view, is tantamount to holding that "business necessity under the ADA and the Rehabilitation Act can be established merely by suggesting that there is a possibility, no matter how slight, that a situation 'may' arise in which the employment of a disabled worker could lead to injury." Pet. 30. Petitioner characterizes the government's arguments in the court below in similar fashion. See Pet. 15-20.

That is not the government's position, nor is it what the court of appeals held. The government does not contend, as petitioner suggests, that it is "legally irrelevant" whether hearing aids "fail once a week or only once a century," or that "*any* hypothetical risk means that an individual can be dismissed from [his or her] job." Pet. 18, 19-20 (brackets in original). Rather, the government has relied throughout this litigation on uncontradicted reports of several audiological experts for their analysis of the risk factors of hearing aids and their substantive conclusion that such risk factors, in this unique employment setting, make hearing aids appropriate for "use only as an enhancement and not as an alternative method to meet unaided hearing standards" for the CSO position. See Govt. C.A. Br. 30 (quoting Docket entry No. 78, Exh. 6 (attached Exh. A at 6) (July 3, 2006) (Kramer Decl.)); *id.* at 29-30; pp. 3-5, *supra*.[1]

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[1] Petitioner cites one of his experts' affidavits as establishing that "hearing aids rarely fail." See Pet. 35 & n.44 (citing Docket entry No. 101, Exh. J at 2 (Aug. 11, 2006) (Ricketts Aff.)). But petitioner overstates the expert's testimony, which "acknowledged that batteries will fail, ear wax can lead to hearing aid failure and some cell phones can

Petitioner's experts failed to raise a genuine issue of material fact as to that issue. See Pet. App. 8a-9a; Govt. C.A. Br. 30-31. The court of appeals further relied, in particular, on the "tremendous harm that could result" to court officers, staff, or members of the public "if a security officer could not perform the essential functions of his job at a given moment." *Id.* at 9a. Although the court did not insist upon a precise quantification of the risk of failure, it did not suggest, as petitioner contends, that any hypothetical risk, however remote, would be sufficient.

Petitioner contends (Pet. 21-22) that the Eleventh Circuit's decision conflicts with the general rule that "the availability of a safety-based justification depends in part on the likelihood that employment of the worker in question would result in injury to others or to himself." But the decision below does not contradict that principle. The court's statement that hearing aids "may malfunction, break, or become dislodged," Pet. App. 9a, does not enunciate a new standard of law regarding the probability required to make out a showing of business necessity. Rather, the quoted language simply identified the numerous varieties of hearing aid failure—a fact that petitioner's experts did not dispute, see Govt. C.A. Br. 30-31 (discussing petitioner's experts' testimony). The court of appeals did not even directly address what quantum of risk of failure must be demonstrated—apart

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interfere with some specific hearing aids." Docket entry No. 101, Exh. J at 2 (Aug. 11, 2006) (Ricketts Aff.). Although the report indicates that those risks can be mitigated to some degree, it does not suggest that they can be eliminated. *Ibid.* Moreover, that expert's analysis did not address many of the risks identified by the government's (and petitioner's) other experts—including other manners of device malfunction, improper seating, and acoustic feedback. *Ibid.*

from an observation that the burden of establishing business necessity is "generally quite high" but is reduced where the harm that would result if the risk were realized is great, Pet. App. 7a. That observation is entirely consistent with the cases upon which petitioner relies to evidence a supposed conflict with other circuits. See *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000) ("The acceptable probability of an incident will vary with the potential hazard posed by the particular position.") (cited at Pet. 22); *Bates* v. *United Parcel Serv., Inc.*, 511 F.3d 974, 996 (9th Cir. 2007) (en banc) (quoting same) (cited at Pet. 23).

Petitioner contends (Pet. 35-36) that the court of appeals erred by failing to insist on a quantification of the probability that a CSO's hearing aid would fail at the precise moment that an emergency situation arose in which the CSO's inability to hear would be critical, thus leading to the injury of a judge or other individual at the court. Petitioner bases that contention on the premise that only when an employee presents a "direct threat," posing a "significant risk to the health or safety of others," can a safety-related employment standard qualify as a business necessity. See Pet. 31 (quoting 42 U.S.C. 12111(3), 12113(b)). But petitioner never argued in the court of appeals that the "direct threat" standard of Section 12113(b) was the appropriate measure for assessing the respondents' business necessity defense. Indeed, petitioner's sole reference to "direct threat" in his court of appeals' briefs was in a footnote of his reply brief in which petitioner noted that a cited case was a "direct threat case," in contrast to the "business necessity case[]" on which petitioner had relied in his opening brief. See Pet. C.A. Reply Br. 22 n.11. Nor did the court of appeals address the relevance of Section

12113(b) to business-necessity defenses based on safety-related qualifications. Because application of Section 12113(b) was neither pressed nor passed upon in the courts below, petitioner should not be allowed to urge that argument before this Court in the first instance. See *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court * * * is one of final review, not of first view.") (internal quotation marks and citation omitted). As the Court has noted, it remains an open question "whether all safety-related qualification standards must satisfy the ADA's direct-threat standard." *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 80 n.3 (2002) (citing *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 569 n.15 (1999)). Petitioner's failure to invoke Section 12113(b) below—and the consequent lack of analysis from the court of appeals—renders this case a particularly poor vehicle in which to consider the rubric for assessing qualification standards under the Rehabilitation Act.[2]

At bottom, petitioner's grievance is with the court of appeals' application of the summary judgment standard to the facts of this case. Petitioner's repeated emphasis (Pet. 3-5 & n.3, 7-11, 23) on the records and outcomes in other suits against the Marshals Service makes that clear. Petitioner's contention that facts adduced in

[2] Petitioner's contention (Pet. 33) that review is warranted because the court of appeals' decision conflicts with this Court's opinion in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), is similarly misplaced. Petitioner did not discuss *Arline* in his court of appeals briefs. Moreover, the rule adopted by this Court in *Arline* was later codified in Section 12113(b), see *Bragdon* v. *Abbott*, 524 U.S. 624, 649 (1998); *Exxon*, 203 F.3d at 874. Thus, petitioner's invocation of *Arline* is in reality only another variation of his argument that all safety-based business-necessity defenses must satisfy the "direct threat" standard of Section 12113(b), an argument that petitioner failed to preserve.

other cases undercut respondents' business necessity defense—or that the court of appeals granted undue weight to particular evidence in this record—is not a ground for this Court's review.[3]

2. Review by this Court is particularly unwarranted in this case because resolution of the question presented would not alter the outcome of this case. Petitioner cannot recover under the Rehabilitation Act for an independent reason: he is not disabled under the terms of the Act. Although the court of appeals declined to ad-

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[3] Petitioner is incorrect to suggest (Pet. 32) that the decision below conflicts with settlement agreements between the United States Department of Justice and localities regarding hearing aid restrictions. Those agreements note—consistent with the statute—that qualification standards tending to screen out individuals with disabilities are valid if they are shown to be job-related for the position in question and consistent with business necessity. See Govt. C.A. Br. 40 (citing agreements). The decisions below hold only that, on the record in *this* case, there was no genuine dispute of material fact regarding the respondents' business necessity defense. What the record in other cases, or out-of-court settlement agreements, may or may not have established is irrelevant. Even if there were a difference in the application of summary judgment principles between the courts below and district courts in other circuits, that would not warrant review by this Court of so fact-specific an issue.

To the extent the outcomes of other district court cases is relevant, the overwhelming majority of courts have granted summary judgment to defendants in cases similar to this, either on the business necessity defense or on the antecedent question whether the disqualified CSO was a qualified individual with a disability. See *Fraterrigo* v. *Akal Security*, No. 06-civ-9861, 2008 WL 4787548 (S.D.N.Y. Oct. 29, 2008) (business necessity); *McGovern* v. *MVM, Inc.*, 545 F. Supp. 2d 468, 476 (E.D. Pa. 2008) (otherwise qualified); see also p. 13, *infra* (citing cases holding that disqualified CSOs are not regarded as disabled).

dress the issue, Pet. App. 6a,[4] the majority of courts to do so have held that the Marshals Service does not regard a CSO as disabled under the statute simply because the individual was disqualified pursuant to the agency's medical guidelines. See *Walton* v. *United States. Marshals Serv.*, 492 F.3d 998, 1007 (9th Cir. 2007), cert. denied, 128 S. Ct. 879 (2008); *Bush* v. *Mukasey*, 268 Fed. Appx. 41 (2d Cir. 2008); *Strolberg* v. *Akal Sec., Inc.*, 210 Fed. Appx. 683 (9th Cir. 2006); *Kemp* v. *Ashcroft*, No. 03-1633 (W.D. La. Mar. 3, 2009); *Fraterrigo* v. *Akal Sec., Inc.*, No. 06-9861, 2008 WL 4787548 (S.D.N.Y. Oct. 29, 2008); *Leitch* v. *MVM, Inc.*, 538 F. Supp. 2d 891, 898-903 (E.D. Pa. 2007); *Hurlbut* v. *Akal Sec., Inc.*, No. 2:04-CV-121 (S.D. Ga. Feb. 15, 2006); *McMullin* v. *Ashcroft*, 337 F. Supp. 2d 1281, 1298-1299 (D. Wyo. 2004); *Beck* v. *United States Marshals Serv.*, No. 02-1579-L (W.D. Okla. Nov. 4, 2004).[5]

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[4] The district court held that a genuine issue of material fact existed as to whether respondents had regarded petitioner as disabled. Pet. App. 25a-36a.

[5] The ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3555, which became effective on January 1, 2009, broadened the definition of disability under the ADA and thus under the Rehabilitation Act. The courts of appeals, however, have held that these amendments apply only prospectively. See *Lytes* v. *District of Columbia Water & Sewer Auth.*, 572 F.3d 936, 939-942 (D.C. Cir. 2009); *Milholland* v. *Sumner County Bd. of Educ.*, 569 F.3d 562, 567 (6th Cir. 2009) (citing cases); *EEOC* v. *Agro Distrib., LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009). The Equal Employment Opportunity Commission has likewise stated that the amendments apply only prospectively. See EEOC, *Questions & Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008* (last modified Sept. 23, 2009) <http://www.eeoc.gov/policy/docs/ qanda_adaaa_nprm.html> ("The ADAAA does not apply retroactively.").

To be "regarded as" disabled, an employer must perceive an employee or applicant to have an impairment that substantially limits a major life activity. However, as this Court has explained, an employer "is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job." *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 490-491 (1999) (emphasis omitted). The CSO medical guidelines are designed to assess a candidate's ability to fulfill the tasks of the CSO position, not a broad range of jobs or hearing in everyday life. Dr. Miller's study "was conducted, and the medical standards developed, specifically for the CSO position," and the resulting standards "were not meant to assess whether CSOs are medically qualified to perform other jobs or whether they are substantially limited in any major life activities." Docket entry No. 78, Exh. 3, at 5 (July 3, 2006) (Miller Decl. ¶12).[6] When evaluating CSO medical qualifications, the Marshals Service "does not consider whether the CSO's medical condition limits his or her ability to hold other jobs (including other law enforcement jobs) or affects his or her day-to-day activities," but is "only concerned with whether the individual meets the CSO medical standards and is capable of performing the essential functions of the CSO position." Docket entry No. 78, Exh. 1, at 8 (July 3, 2006) (Farmer

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[6] See also Docket entry No. 78, Ex. 2, at 5 (July 3, 2006) (Roth Decl. ¶8) ("The study was designed solely for the purpose of devising standards for the CSO position. It was in no way intended to reflect a CSO's ability to engage in life activities or to perform other jobs, including other types of security work."); Docket entry No. 78, Ex. 1, at 4 (July 3, 2006) (Farmer Decl. ¶10) ("The study was conducted and the medical standards contained therein were based solely on the CSO position and not on any other position.").

Decl. ¶19). And when the Marshals Service instructed Akal to remove petitioner from the CSO contract, it did not do so because petitioner could not hear or work. Indeed, by petitioner's own account, it was "undisputed" that petitioner was able to work although he had "never owned or wore hearing aids" and did not "even realize[] * * * that there was anything wrong with his hearing." Pet. 12-13. Rather, the Marshals Service directed that petitioner be removed because he "d[id] not meet the contract medical requirements" for Court Security Officers specifically. Docket entry No. 104, Exh. Z at 4 (letter from Maxine Robinson to Daya Khalsa (Feb. 2, 2004)).

Resolution of the question presented accordingly would not alter the outcome of this case. A CSO's "failure to meet the USMS hearing standards does not raise a genuine issue of material fact that the USMS regarded her as disabled." *Walton*, 492 F.3d at 1007. Petitioner thus could not establish entitlement to relief under the Rehabilitation Act regardless of the particular standard that applies to respondents' business necessity defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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